FILED BY CLERK
JAN 27 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MICHAEL RAY WEEKS, Appellant.	)	2 CA-CR 2007-0252 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR 200500442

Honorable James L. Conlogue, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

Thomas J. Phalen, Esq.
Phoenix
Attorney for Appellant

P E L A N D E R, Chief Judge.

¶1 After a jury trial, Michael Weeks was found guilty of kidnapping, six counts of sexual assault, and three counts of aggravated assault of his then girlfriend, M. The trial court sentenced him on all counts to presumptive terms, some concurrent to others, totaling 44.5 years' imprisonment. Weeks raises eight issues on appeal. Finding no error, we affirm.

Background

¶2 "We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts." *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). Weeks and the victim, M., lived together in his grandparents' house. After coming home on the night of June 4 or early morning of June 5, 2005, Weeks got into bed with M., removed her clothes, forced her to perform oral sex on him, and sexually assaulted her several times. He also choked and hit her.

¶3 The next morning M. went to work, where a co-worker noticed she was upset. After someone contacted the police, an officer arrived at M.'s workplace, interviewed her, and photographed her physical injuries. The officer then transported her to a hospital emergency room. A nurse examined her, documented her injuries, and collected DNA[1] evidence, which was later identified as belonging to Weeks.

¶4 Weeks was charged with six counts of sexual assault, four counts of aggravated assault, and one count of kidnapping. His first trial in September 2006 resulted in a mistrial. Weeks testified at his second trial, claiming he had had consensual sex with M. but had not

[1]Deoxyribonucleic acid.

hit or hurt her. The jury found him guilty on all counts except one of the aggravated assault charges.

I. Double jeopardy claim

¶5 Weeks first contends his "second trial was barred by the Double Jeopardy Clause" of both the United States and Arizona Constitutions. U.S. Const. amend. V; Ariz. Const. art. II, § 10. That clause "prevent[s] a second prosecution for the same offense after conviction or acquittal and bar[s] multiple punishments for the same offense." *State v. Bartolini*, 214 Ariz. 561, ¶ 7, 155 P.3d 1085, 1087 (App. 2007); *see also State v. Aguilar*, 217 Ariz. 235, ¶ 8, 172 P.3d 423, 426 (App. 2007). Generally, we review de novo whether double jeopardy applies. *Bartolini*, 214 Ariz. 561, ¶ 6, 155 P.3d at 1087. But to the extent Weeks contends the trial court erred in failing to dismiss the charges against him on double jeopardy grounds after the mistrial, which resulted from prosecutorial misconduct, we review that ruling for an abuse of discretion. *See State v. Korovkin*, 202 Ariz. 493, ¶ 5, 47 P.3d 1131, 1133 (App. 2002); *State v. Trani*, 200 Ariz. 383, ¶ 5, 26 P.3d 1154, 1155 (App. 2001).

¶6 Before his first trial, Weeks moved to preclude any evidence of "prior bad acts" pursuant to Rule 404(b), Ariz. R. Evid.[2] At a hearing on the motion, the state agreed not to introduce any such evidence and to instruct its witnesses to refrain from testifying about any prior acts. The trial court confirmed that agreement on the record and stated in its minute

[2]Rule 404(b), Ariz. R. Evid., generally precludes "evidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith."

entry: "[T]he State's response is that no prior act evidence will be introduced, and [the prosecutor] will instruct her witnesses that no prior acts will come in as testimony. . . . [T]he State has conceded, therefore, this motion is moot."

¶7 During M.'s testimony at the first trial, however, the prosecutor asked her about her previous drug use and inquired if she had ever used illegal drugs with Weeks. When she responded affirmatively, Weeks objected and moved for a mistrial. The trial court deferred ruling on the motion until it could "review the file." The prosecutor, who had not been personally involved in the pretrial motions, said he had understood "the prior acts that were excluded had to do with previous fighting between the couple."

¶8 Shortly after the prosecutor resumed his direct examination of M., the following exchange occurred:

> Q. When you guys would engage in sex together, describe what you mean by that.
>
> A. I mean, we would just have sex. I don't know. We didn't really, are you talking about before or--
>
> Q. Well, before June 5th of 2005?
>
> A. Well, in the beginning when we were going out, it was pretty normal. It wasn't violent or forced or anything, you know. It wasn't like he made me do anything, and then later on, it changed.

Weeks objected and again moved for a mistrial. Based on Weeks's arguments on that motion and later, after trial, he apparently did not want the jury to hear about a prior incident of

domestic violence that allegedly had occurred between M. and him on June 1, a few days before the June 5 incident in question.

¶9 The trial court initially denied the motion but, after further discussion, granted the mistrial. Before doing so, the court noted that M.'s testimony about prior drug use was "inadmissible, but curable," but also questioned whether M.'s testimony touched on the forbidden topic of "violence or coerced sexual activity" before June 5. The court further noted the purpose of Weeks's pretrial motion in limine and the ruling thereon was simply to preclude any evidence on such pre-June 5 matters.

¶10 A week after the mistrial, Weeks moved to dismiss all charges against him with prejudice on double jeopardy and due process grounds. After a hearing at which a detective testified and the parties argued, the trial court denied the motion. Weeks petitioned for special action relief in this court, but we declined to accept jurisdiction, stating that "[a]lthough the court does not condone the state's behavior in causing a mistrial or its questionable explanation thereof . . . [we] decline[] to accept jurisdiction." *Weeks v. Conlogue*, No. 2 CA-SA 2006-0103 (order issued Jan. 11, 2007). Our supreme court denied Weeks's petition for review, and his trial was rescheduled. At a pretrial hearing, Weeks moved the court to reconsider his motion to vacate the trial and dismiss all charges. Again, the trial court denied the motion. A few days later, Weeks's second trial began, which led to his convictions.

¶11 Weeks maintains his second trial was barred by the Double Jeopardy Clause because the prosecutor's "intentional misconduct" caused the mistrial at the first trial. Weeks refers to two instances of misconduct: (1) the prosecutor's question about Weeks's prior drug use, and (2) the question about Weeks's and M.'s sexual relationship before June 5. He argues the prosecutor's misconduct was intentional because he "specifically tailored" his questions "to bring out Weeks'[s] prior bad acts." Additionally, Weeks points out that the prosecutor had already violated the pretrial order by asking about Weeks's prior drug use when he again violated it by clarifying the time frame for M., seeking information about her sexual relationship with Weeks "before June 5th of 2005[.]"

¶12 Generally, a mistrial resulting from prosecutorial misconduct does not prevent a retrial. *Trani*, 200 Ariz. 383, ¶ 6, 26 P.3d at 1155. A retrial is barred, however, when three factors exist:

> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
>
> 2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
>
> 3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Pool v. Superior Court, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984) (footnote omitted); *see also State v. Lamar*, 205 Ariz. 431, ¶ 45, 72 P.3d 831, 840 (2003). The

prosecutor's knowledge and intent are judged by an objective standard. *See Pool*, 139 Ariz. at 109 n.9, 677 P.2d at 272 n.9.

¶13 Here, the first element arguably is satisfied because the mistrial was caused by the prosecutor's action—his direct questioning—which elicited the improper testimony. *See Pool*, 139 Ariz. at 108, 677 P.2d at 271. But a retrial is not prohibited unless the prosecutor "acted intentionally, knowing his conduct to be improper, and in the pursuit of an improper purpose without regard to the possibility of causing a mistrial." *Trani*, 200 Ariz. 383, ¶ 7, 26 P.3d at 1155; *see also Pool*, 139 Ariz. at 108, 677 P.2d at 271. And double jeopardy does not necessarily bar a second trial when the prosecutor's behavior is less egregious than the pattern of misconduct that occurred in *Pool*. *See Trani*, 200 Ariz. 383, ¶¶ 9-10, 26 P.3d at 1156; *see also State v. Hughes*, 193 Ariz. 72, ¶ 31, 969 P.2d 1184, 1192 (1998); *State v. Wright*, 112 Ariz. 446, 450, 543 P.2d 434, 438 (1975) (prejudicial error when prosecutor causes mistrial to avoid acquittal or cause harassment). In addition, to bar a retrial, the prosecutor's conduct must have caused Weeks prejudice "which cannot be cured by means short of a mistrial." *Pool*, 139 Ariz. at 109, 677 P.2d at 272.

¶14 Here, although the prosecutor's first question about Weeks's prior drug use was improper, Weeks promptly objected, and the prosecutor immediately stopped that line of questioning. As the trial court noted, that error could have been cured without ordering a mistrial. Therefore, that improper question alone did not unduly prejudice Weeks or require the mistrial. *See Pool*, 139 Ariz. at 109, 677 P.2d at 272.

¶15 As for the second objectionable inquiry, it was M.'s answer to the prosecutor's clarifying question that improperly introduced the forbidden subject matter, not the question itself. Although the prosecutor clearly asked M. about her sexual relationship with Weeks before June 5, 2005, neither Weeks's motion to preclude nor the court's pretrial order prohibited *all* evidence about their relationship before June 5. Rather, that motion and ruling were directed at Weeks's "prior bad acts" before the June 5 incident.

¶16 Contrary to Weeks's argument, the prosecutor did not automatically violate the pretrial order by asking M. about her sex life with Weeks before June 5—a question that did not clearly or necessarily violate that order. Rather, the prosecutor explained he had intended to elicit testimony about the consensual nature of the relationship before the June 5 incident and had instructed M. not to discuss any prior violence. Therefore, although the prosecutor could have better tailored his question, given his instruction to M. and his vehement opposition to a mistrial, the record does not compel a finding that he intentionally asked M. about a prior violent act or acted with indifference to causing a mistrial. *See Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72.

¶17 Weeks contends, however, the prosecutor had "a powerful motive to provoke a mistrial" because the case was not going well. At the hearing on Weeks's motion to dismiss after the mistrial, a detective involved in the case testified he had had some concerns about the state's presentation of the case and had communicated with the prosecutor about those concerns. And defense counsel told the court "a juror [had] approached [him]

following the case . . . and indicated that at that time it was the position of at least four jurors that this case was going horribly for the Prosecution." But before M.'s testimony and the declaration of a mistrial, the state had presented only three witnesses, one as a "first responder" and the other two for "chain of custody." The two witnesses who linked M.'s injuries to Weeks—the nurse and DNA expert—had not testified. And, the state argued against a mistrial, suggesting the prosecutor had not acted with "indifference" to the possibility of causing that result. *See Pool*, 139 Ariz. at 108, 677 P.2d at 271.

¶18 "We defer to the trial court's finding that the prosecutor's comment here, if improper, was not intentionally so." *Korovkin*, 202 Ariz. 493, ¶ 8, 47 P.3d at 1133. In denying Weeks's motion to dismiss, the trial court expressly remarked it had viewed the prosecutor's "demeanor and presentation . . . in the courtroom" and found that his conduct during the first trial did not warrant dismissal of the charges.

¶19 The prosecutor's conduct in this case resembles the isolated incident of misconduct that occurred in *State v. Detrich*, 178 Ariz. 380, 385, 873 P.2d 1302, 1307 (1994). *See also Trani*, 200 Ariz. 383, ¶¶ 10-12, 26 P.3d at 1156-57. In *Detrich*, the defendant's first trial resulted in a mistrial when a police officer testified that the defendant had exercised his right to remain silent. 178 Ariz. at 385, 873 P.2d at 1307. As in *Detrich*, where the prosecutor did not deliberately inject error "in order to force the defendant to request a mistrial," *id.*, the prosecutor's questions in this case were not clearly designed to cause a mistrial, avoid acquittal, or cause harassment. *See Pool*, 139 Ariz. at 105, 677 P.2d

at 268; *Wright*, 112 Ariz. at 450, 543 P.2d at 438. And, like *Detrich*, it was the witness's answer that introduced the improper subject, not the prosecutor's question. 178 Ariz. at 385, 873 P.2d at 1307. In sum, the trial court did not abuse its discretion by denying Weeks's motion to dismiss the charges on double jeopardy or due process grounds. *See Trani*, 200 Ariz. 383, ¶ 5, 26 P.3d at 1155.

II. Hearsay

¶20 Weeks next argues his Sixth Amendment right to confront witnesses was violated "repeatedly" when the trial court admitted two categories of hearsay statements. First, he contends the court erred by allowing the nurse and detective to testify about M.'s statements to them. Second, Weeks claims the court erroneously admitted the detective's testimony about Weeks's denials in an interview. We review a court's evidentiary rulings for an abuse of discretion. *State v. Tucker*, 205 Ariz. 157, ¶ 41, 68 P.3d 110, 118 (2003). "Evidentiary rulings that implicate the Confrontation Clause, however, are reviewed de novo." *State v. Ellison*, 213 Ariz. 116, ¶ 42, 140 P.3d 899, 912 (2006).

¶21 The Sixth Amendment guarantees a defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. "Admission of testimonial hearsay violates the Confrontation Clause of the Sixth Amendment unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination." *State v. Bocharski*, 218 Ariz. 476, ¶ 37, 189 P.3d 403, 413 (2008); *see also Crawford v. Washington*, 541 U.S. 36, 68 (2004). "'Hearsay'" is defined as "a statement . . . offered in evidence to prove the truth

of the matter asserted." Ariz. R. Evid. 801(c). Generally, hearsay is inadmissible "except as provided by applicable constitutional provisions, statutes, or rules." Ariz. R. Evid. 802.

A. M.'s statements

¶22 We first address the nurse's and detective's testimony about statements M. made during her examination and interview with them. Weeks argues the admission of M.'s statements through those witnesses violated the Confrontation Clause. But because he failed to object below on Sixth Amendment grounds to any aspect of their testimony, he has forfeited review of this issue for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d 668, 670 (App. 2006). Additionally, as the state correctly points out, in his opening brief Weeks failed to identify which statements were objectionable or adequately develop this argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). Thus, his argument is waived. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). Even if his claim were not waived, however, the Confrontation Clause was not implicated here because M. testified at trial and was subject to cross-examination. *See State v. Lopez*, 217 Ariz. 433, ¶ 17, 175 P.3d 682, 687 (App. 2008) ("[T]here was no Confrontation Clause issue because [declarant] testified at trial and was subject to cross-examination.").

B. Weeks's prior statements

¶23 Weeks also challenges the trial court's admission of his out-of-court statements to the detective the day after the incident in which he claimed he never "struck" M. and

initially denied having had sex with her the night before.[3] The court admitted the statements as non-hearsay under Rule 801(d)(2). That rule, entitled "Admission by party-opponent," provides that a statement is non-hearsay when "[t]he statement is offered against a party and is . . . the party's own statement." Ariz. R. Evid. 801(d)(2)(A). We review the court's evidentiary ruling for an abuse of discretion, *see Tucker*, 205 Ariz. 157, ¶ 41, 68 P.3d at 118, and find none here.

¶24 Focusing on the word "[a]dmission" in the heading to Rule 801(d)(2), Weeks contends that "[i]f a statement is not an admission, but indeed is a denial, then it clearly does not fit within this exception." But as the state points out, his statements were not offered "to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). Rather, the state's case was based on its theory that his statements to the detective were false. *See State v. Ceja*, 113 Ariz. 39, 42, 546 P.2d 6, 9 (1976). Thus, his statements were non-hearsay within the meaning of Rule 801(c).

---

[3]Although the issue statement in Weeks's opening brief includes a claim that the trial court's admission of this evidence violated the Sixth Amendment, he fails to further develop or discuss the issue. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). And at trial, he only objected on hearsay grounds under Rule 801, not the Confrontation Clause. *See State v. Moody*, 208 Ariz. 424, ¶ 39, 94 P.3d 1119, 1136 (2004) (objection "must state specific grounds in order to preserve the issue for appeal"). Therefore, he did not adequately preserve the issue for appeal. *Id.*; *see also Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d at 670. And we do not review for fundamental, prejudicial error, *see Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607, because Weeks waived that issue by failing to argue it on appeal. *See Carver*, 160 Ariz. at 175, 771 P.2d at 1390.

¶25 Additionally, an admission does not need to be a statement against interest to be admissible under Rule 801(d)(2). *See State v. Atwood*, 171 Ariz. 576, 619-20, 832 P.2d 593, 636-37 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001); *State v. Wood*, 180 Ariz. 53, 65, 881 P.2d 1158, 1170 (1994) ("A defendant's out-of-court statements are not hearsay when offered by the state."); *see also United States v. Shulman*, 624 F.2d 384, 390 (2d Cir. 1980) (party's statement qualifies under rule "regardless of whether such statements were against his interest when made"); *United States v. Rios Ruiz*, 579 F.2d 670, 676 (1st Cir. 1978). Therefore, the trial court did not abuse its discretion in determining Weeks's statements were non-hearsay under Rule 801 and, therefore, admissible through the detective's testimony.

¶26 Weeks maintains, however, Rule 801(d)(2) is asymmetrically applied because courts generally exclude similar statements when offered by a defendant. *See State v. Smith*, 138 Ariz. 79, 84, 673 P.2d 17, 22 (1983) (defendant's exculpatory statement inadmissible when it lacked "guarantee[] of trustworthiness"); *State v. Anaya*, 170 Ariz. 436, 441-42, 825 P.2d 961, 966-67 (App. 1991) (same). He argues the "disparate treatment of identical evidence depending on who is seeking its admission" violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

¶27 Weeks failed to raise this constitutional argument below. Therefore, his claim is forfeited for all but fundamental, prejudicial error. *See Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d at 670 (fundamental error review applies when defendant fails to object on

constitutional grounds below). Weeks has the burden to prove that error occurred and that it was fundamental and prejudicial. *See Henderson*, 210 Ariz. 561, ¶¶ 19, 23, 115 P.3d at 607, 608. Other than a general statement in his reply brief that the "assymetric application of the rules of evidence . . . presents fundamental 14th Amendment Due Process and Equal Protection problems," Weeks has not argued how any alleged error was fundamental or how he was prejudiced. And, as discussed above, no evidentiary error occurred because Weeks's statements were non-hearsay. *See* Ariz. R. Evid. 801(c). Thus, on appeal Weeks has not sufficiently argued or carried his burden of establishing that fundamental error occurred, and that it was prejudicial. *See State v. Ramsey*, 211 Ariz. 529, n.6, 124 P.3d 756, 766 n.6 (App. 2005); *State v. Cons*, 208 Ariz. 409, ¶ 3, 94 P.3d 609, 611 (App. 2004); *see also Henderson*, 210 Ariz. 561, ¶¶ 19, 23, 115 P.3d at 607, 608.

¶28 Finally, Weeks contends "he was forced to testify because the trial court erroneously admitted his and M[.'s] hearsay statements." But, as we have already concluded, the trial court did not abuse its discretion in admitting those statements. Therefore, this argument is without merit.

III. State's untimely disclosure

¶29 Next, Weeks argues the trial court erroneously allowed the state to introduce evidence at the second trial that was precluded as a disclosure violation sanction before the first trial. He contends the "law of the case doctrine" prohibited the court from reversing its prior ruling because the "lapse of time" that cured the disclosure violation resulted from the

prosecutor's fault in causing the mistrial. We review a trial court's reconsideration and reversal of a prior ruling for an abuse of discretion. *State v. King*, 180 Ariz. 268, 279, 883 P.2d 1024, 1035 (1994). And, a court's ruling regarding disclosure violations will not be reversed "absent a showing of abuse of discretion and a showing of prejudice." *State v. Nordstrom*, 200 Ariz. 229, ¶ 71, 25 P.3d 717, 739 (2001). We find neither factor here.

¶30 The law of the case doctrine is "'the judicial policy of refusing to reopen questions previously decided in the same case by the same court or a higher appellate court.'" *Jimenez v. Wal-Mart Stores, Inc.*, 206 Ariz. 424, ¶ 12, 79 P.3d 673, 677 (App. 2003), *quoting Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 278, 860 P.2d 1328, 1331 (App. 1993); *see also State v. Whelan*, 208 Ariz. 168, ¶ 8, 91 P.3d 1011, 1014 (App. 2004). But Rule 16.1(d), Ariz. R. Crim. P., allows a court to reconsider a previous ruling on a showing of good cause.[4] *See also King*, 180 Ariz. at 279, 883 P.2d at 1035.

¶31 Here, before the first trial, the state failed to timely disclose the notes of the nurse who had examined M., pursuant to Rule 15.6, Ariz. R. Crim. P. The rest of the nurse's written report was timely disclosed. The trial court sanctioned the state for the discovery violation by ruling that the state would not be permitted to introduce or rely on the nurse's notes "in any fashion" at the first trial. *See* Ariz. R. Crim. P. 15.7(a)(1). Before the nurse testified, the court declared the mistrial.

---

[4]Rule 16.1(d), Ariz. R. Crim. P., provides, "Except for good cause . . . an issue previously determined by the court shall not be reconsidered."

¶32 In April 2007, approximately a year after the untimely disclosure, the state moved the trial court to reconsider its previous order. The court amended its ruling by allowing the nurse "to refer to [her] notes during her testimony," but again precluded the state from introducing the notes into evidence. The court found good cause existed for altering the previous order, stating:

> The reason for the original order was the prejudice that would have been caused to the defendant . . . .
>
> But the prejudice has gone away at this point, and that is the primary basis for the Court's ruling. The good cause is simply that the Court wishes as fully as possible, to allow the jury to consider the facts, and that this witness is a very important factual witness.

See Ariz. R. Crim. P. 16.1(d).

¶33 Generally, "[t]he trial court . . . should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible." *State v. Fisher*, 141 Ariz. 227, 246, 686 P.2d 750, 769 (1984). And, a court does not abuse its discretion by denying a sanction when it "believes the defendant will not be prejudiced." *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). We have no basis for overturning the trial court's finding of good cause, and the court did not abuse its discretion by determining on reconsideration that the passage of time between the trials cured any prior prejudice caused by the state's untimely disclosure. *Cf. State v. Davis*, 137 Ariz. 551, 560, 672 P.2d 480, 489 (App. 1983) (record and court's comments "reveale[d] good cause for the trial court's reconsideration of the motion").

¶34 Additionally, as the state points out, Weeks's "argument is based on the wrong assumption that [the nurse's] notes were introduced into evidence." Weeks states "the sanction evaporated entirely" because the trial court admitted the nurse's notes. But the exhibit Weeks refers to in his opening brief does not include the three pages of her notes, nor does the record reflect that they were ever admitted into evidence. Additionally, the record does not reflect that the nurse referred to or relied on her notes at all during her testimony. Rather, when she refreshed her recollection by looking at some documents, it appears she relied on the properly disclosed exhibit admitted at trial, not the three pages of her report that previously were omitted. Thus, no error occurred, and Weeks was not prejudiced by the trial court's reconsideration and reversal of the pretrial ruling. *See Nordstrom*, 200 Ariz. 229, ¶ 71, 25 P.3d at 739.

IV. Kidnapping conviction

¶35 Weeks asks this court to vacate his class two felony conviction and sentence for kidnapping because he "is guilty only of class [four] felony kidnapping." He contends A.R.S. § 13-1304(B) includes an element of the offense that was not included in the jury instructions or found by the jury beyond a reasonable doubt as required by *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Weeks neither objected to the jury instruction on kidnapping, nor did he raise this argument below.[5] Therefore, we review for fundamental,

[5]Weeks maintains he raised the argument below in that, when the trial court asked counsel at a settlement conference before the first trial how to present the kidnapping charge to the jury, his attorney stated § 13-1304(B) set forth "an element of the offense." But his

prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. No error, fundamental or otherwise, occurred here.

¶36 A person is guilty of kidnapping when he "knowingly restrain[s] another person with the intent to . . . [i]nflict death, physical injury or a sexual offense on the victim." A.R.S. § 13-1304(A)(3). Section 13-1304(B) provides, "Kidnapping is a class 2 felony unless the victim is released voluntarily by the defendant without physical injury in a safe place before arrest and before accomplishing any of the further enumerated offenses in subsection A of this section in which case it is a class 4 felony." According to Weeks, his conviction on the class two felony kidnapping charge cannot stand because the jury "was never asked" or "decided . . . whether [he] released [the victim] voluntarily, without physical injury, in a safe place, prior to his arrest."

¶37 We reject this argument. In *State v. Tschilar*, 200 Ariz. 427, ¶¶ 1, 14, 27 P.3d 331, 334, 336 (App. 2001), Division One of this court determined that § 13-1304(B) is not an element of kidnapping that has to be found by a jury beyond a reasonable doubt. Rather, that subsection is relevant to sentencing and "has no bearing on the jury's determination that

---

counsel then amended that statement, explaining "I was thinking about the assault charge. . . . I think with the kidnapping charge, well, we could do it two ways, as a lesser included offense instruction or we could do it as an interrogatory." In addition, Weeks made no argument at all on this point at the retrial; nor did he object to the trial court's instruction on the kidnapping charge or ever request a particular jury instruction, finding, form of verdict, or special interrogatory relating to § 13-1304(B). *See* Ariz. R. Crim. P. 21.2, 21.3(c). Accordingly, Weeks has forfeited review of the issue relating to § 13-1304(B) for all but fundamental, prejudicial error. *See State v. Hamblin*, 217 Ariz. 481, n.2, 176 P.3d 49, 51 n.2 (App. 2008).

the offense of kidnapping had been committed." *Tschilar*, 200 Ariz. 427, ¶ 19, 27 P.3d at 337; *see also State v. Eagle*, 196 Ariz. 188, ¶ 17, 994 P.2d 395, 399 (2000) (voluntary release of kidnapping victim is "mitigating factor relevant solely for sentencing purposes"). As the court in *Tschilar* concluded, "*Apprendi* does not affect the analysis [or holding] in *Eagle*," which Weeks does not address, and does not require a jury to determine the non-element, mitigating sentencing factor under § 13-1304(B) of "the victim's safe release." 200 Ariz. 427, ¶¶ 21, 14, 27 P.3d at 337, 336. Therefore, the trial court did not err by failing to sua sponte include § 13-1304(B) in its jury instructions on kidnapping or to reduce Weeks's conviction to a class four felony when he failed to request either action below and his position on appeal is legally incorrect.

V. Sufficiency of the evidence

¶38 Weeks claims "[t]he trial court abused its discretion when it denied [his] motion for new trial or in the alternative to vacate judgment on the grounds of insufficient evidence to sustain the convictions." To the extent Weeks argues his motion for judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P., was erroneously denied, we review for an abuse of discretion. *See State v. Carlos*, 199 Ariz. 273, ¶ 7, 17 P.3d 118, 121 (App. 2001). As for the denial of his motion for new trial, Weeks has waived that issue by failing to adequately develop or argue it. *See Carver*, 160 Ariz. at 175, 771 P.2d at 1390; *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶39 On appeal, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction." *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005); *see also State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980); *see also State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). The evidence may either be circumstantial or direct. *Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d at 875. "'Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.'" *State v. Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d 693, 695 (App. 2007), *quoting State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996).

¶40 Weeks argues that "there was simply no evidence to support the allegations but the word of the victim" and that her credibility was "seriously in doubt." But, in Arizona, a conviction may be based on "the uncorroborated testimony of the [victim] unless her story is physically impossible, or so incredible that no reasonable [person] could believe it." *State v. Polluck*, 57 Ariz. 415, 417, 114 P.2d 249, 250 (1941); *see also State v. Navarro*, 90 Ariz. 185, 189, 367 P.2d 227, 230 (1961). And, the credibility of witnesses and the weight to be

given their testimony are exclusively matters for the jury. *See State v. Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007); *State v. Cañez*, 202 Ariz. 133, ¶ 39, 42 P.3d 564, 580 (2002).

¶41 M.'s testimony, apparently credited by the jury, is substantial evidence that supports Weeks's convictions. Additionally, although Weeks claims "there was no scientific connection" between M.'s injuries and Weeks, physical evidence corroborated M.'s testimony. The forensic testing of the samples taken during M.'s medical examination identified Weeks's DNA in M.'s vagina, on her abdomen, and in her underwear. The nurse and a police officer testified about M.'s scratches and bruises on her head, neck, and back, areas where she stated Weeks had hit or choked her. Weeks and M. testified at trial, permitting the jury to observe both of them and evaluate their demeanor and credibility. *See Cañez*, 202 Ariz. 133, ¶ 39, 42 P.3d at 580. Although a clear conflict existed between the differing accounts they gave, it was for the jury to resolve any inconsistencies in the evidence, and we will not reweigh the evidence on appeal. *State v. Miller*, 16 Ariz. App. 96, 99, 491 P.2d 485, 488 (1971) (we will "not substitute our opinion for the jury's if there is any evidence to support" its conclusion); *see also State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004); *State v. Patterson*, 4 Ariz. App. 265, 266, 419 P.2d 395, 396 (1966). Viewing the evidence and inferences in the light most favorable to upholding the convictions, we conclude a reasonable jury easily could find beyond a reasonable doubt Weeks had committed each of the charged offenses against M. *See Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d at 477.

VI. Sentencing issues

A. Aggravating factor

¶42 Immediately after the jury returned its verdicts of guilty on the charges against Weeks, the trial court instructed the jurors on the state's allegation, to be determined by them beyond a reasonable doubt in a separate but immediately sequential trial, "that the circumstances of this case are aggravated by the physical, emotional or financial harm suffered by the victim." The victim then testified on that allegation, and the jury returned its verdicts on all charges finding the allegation proven. In later imposing presumptive prison terms on each count, the trial court considered as an aggravating factor "the very severe emotional harm to the victim" and as mitigating factors Weeks's "age, his relatively minor criminal history, and his family support."

¶43 Weeks contends his constitutional rights to due process and trial by jury were violated because the "disjunctive," aggravating circumstance of "physical, emotional or financial harm," A.R.S. § 13-701(D)(9),[6] may be proven by a showing that the victim sustained any one type of harm, thereby "impermissibly lower[ing] the state's burden of proving [the] aggravating factor . . . beyond a reasonable doubt." As the state points out, Weeks did not raise this constitutional argument below, therefore, he has forfeited review for

---

[6]Significant portions of the Arizona criminal sentencing code have been renumbered, effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see* 2008 Ariz. Sess. Laws, ch. 301, § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

all but fundamental, prejudicial error.[7] *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607; *see also State v. Ruggiero*, 211 Ariz. 262, n.6, 120 P.3d 690, 697 n.6 (App. 2005). Weeks bears the burden of first showing error, *Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608, and we find none here.

¶44 Pursuant to Arizona's statutory mandate, the jury found and the trial court considered as an aggravator any "physical, emotional or financial harm" the victim suffered. § 13-701(D)(9). "[W]hen the evidence is sufficient to satisfy each alternative prong of an aggravating circumstance," the circumstance may be established even when it has not been shown that the jurors all relied on the same prong. *State v. Anderson*, 210 Ariz. 327, ¶ 128, 111 P.3d 369, 397 (2005). It is only "when the evidence is insufficient to support one or more of the alternative grounds" that it must be clear on which ground the jury relied. *Id.* ¶¶ 128-30. The evidence presented to the jury here was uncontested and sufficient to support a finding of physical, emotional and financial harm to the victim. Weeks does not argue otherwise. Thus, he has failed to establish any error, fundamental or otherwise, relating to his new constitutional claim.

¶45 In a related argument that was raised below, Weeks maintains the aggravating circumstance of physical harm is "an element of a greater crime," "inherent in most of the

---

[7]Weeks does not expressly argue the alleged constitutional violation was fundamental or prejudicial. *See Ramsey*, 211 Ariz. 529, n.6, 124 P.3d at 766 n.6 (noting defendant's failure to argue fundamental error); *Cons*, 208 Ariz. 409, ¶ 3, 94 P.3d at 611 (same); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi). Accordingly, we also could find the argument waived. *See Carver*, 160 Ariz. at 175, 771 P.2d at 1390.

counts alleged" against him, and, therefore, "duplicitous." He asserts that because "the aggravating circumstance repeats an element of the offense," it "cannot be used to aggravate the crimes." "[W]hether a particular aggravating factor used by the court is an element of the offense and whether the court properly can use such a factor in aggravation are questions of law, which we review *de novo*." *Tschilar*, 200 Ariz. 427, ¶ 32, 27 P.3d at 339.

¶46 As the state correctly points out, with only one exception, physical harm is not an element of any of the other offenses of which Weeks was convicted. To commit sexual assault, one must "intentionally or knowingly engag[e] in sexual intercourse or oral sexual contact with any person without consent of such person." A.R.S. § 13-1406(A). Although it is possible that physical harm could "flow from" that crime, as Weeks argues, a defendant need not physically harm the victim in order to commit sexual assault. Likewise, the crime of kidnapping is complete when one "knowingly restrain[s] another person with the intent to . . . [i]nflict death, physical injury or a sexual offense on the victim." A.R.S. § 13-1304(A)(3). The defendant need only intend to cause physical injury or to commit a sexual offense in order to complete the crime—no actual physical harm to the victim is required. *Id.* Similarly, two of the three aggravated assault charges of which Weeks was convicted did not require the victim to suffer any physical harm, but only a showing that he had acted "with the intent to injure, insult or provoke" the victim while the "victim's capacity to resist [was] substantially impaired." A.R.S. §§ 13-1203(A)(3), 13-1204(A)(4).

¶47 Thus, on only one of the counts of which Weeks was convicted—a third aggravated assault charge—was physical harm arguably an element. *See* § 13-1204(A)(3) (person commits aggravated assault by using "any means of force that causes . . . temporary but substantial loss or impairment of any body organ or part"). Even assuming physical harm is an element of that one offense, however, the trial court could have considered it as an aggravating factor.

¶48 "An element of an offense may be used as an aggravating factor if the legislature has specified that it may be so used." *Tschilar*, 200 Ariz. 427, ¶ 33, 27 P.3d at 339; *see also State v. Lara*, 171 Ariz. 282, 284, 830 P.2d 803, 805 (1992). As the state points out, the legislature has specifically provided that "physical, emotional or financial harm" is an aggravating circumstance that, if proven to the jury, shall be considered by the court in sentencing. § 13-701(D)(9). And, in any event, the trial court expressly found as an aggravating circumstance only the victim's "severe emotional harm," not physical harm.

¶49 Weeks argues *Tschilar* and *Lara* have "been relegated to the jurisprudential past" by *Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004). But the court in *Tschilar* discussed *Apprendi* in other portions of its opinion and did not suggest that *Apprendi* had any relevance on this point. *Tschilar*, 200 Ariz. 427, ¶¶ 15-21, 27 P.3d at 336-37. And our supreme court recently declined to overrule *Lara* on general constitutional grounds. *State v. Cruz*, 218 Ariz. 149, ¶ 130, 181 P.3d 196, 216 (2008). Like the defendant in *Cruz*, Weeks has failed to explain how consideration of physical harm to the victim as an aggravating

circumstance, even assuming the trial court did consider it, violates the constitution or is inconsistent with the holdings of *Blakely* and *Apprendi*. We therefore reject his argument that *Tschilar* and *Lara* are no longer good law on that point.[8]

B. Excessive sentence

¶50 Finally, Weeks argues "[t]he trial court abused its discretion in not reducing the excessive mandatory sentences pursuant to A.R.S. § 13-603(L)" and urges us to reduce his sentence "pursuant to A.R.S. § 13-4037(B)." "[S]entencing is within the sound discretion of the trial court, and a sentence will be upheld if it is within the statutory limits, unless there is a clear abuse of discretion." *State v. Stanley*, 123 Ariz. 95, 107, 597 P.2d 998, 1010 (App. 1979).

¶51 At sentencing, Weeks requested that the trial court "make findings pursuant to [§ 13-603(L)] so that the matter can go to the Commutation Board, once [he] does go to

---

[8]Even if the trial court should not have cited as an aggravating factor the victim's emotional harm, Weeks has not established that the court's consideration of that factor was prejudicial inasmuch as he was sentenced to presumptive prison terms, not aggravated terms. *See State v. Johnson*, 210 Ariz. 438, ¶¶ 10-13, 111 P.3d 1038, 1041-42 (App. 2005) (no error when court considered aggravating factor not found by jury but sentenced defendant to presumptive terms); *cf. Ramsey*, 211 Ariz. 529, n.7, 124 P.3d at 770 n.7 (trial court's consideration of "lack of remorse" as aggravating factor did not warrant resentencing in view of "additional aggravating factors" court cited and presumptive sentence imposed); *Ruggiero*, 211 Ariz. 262, n.6, 120 P.3d at 697 n.6 (defendant failed to establish fundamental, prejudicial error in trial court's consideration of her "'failure to accept responsibility'" in aggravating sentence); *but see Pena*, 209 Ariz. 503, ¶¶ 22-26, 104 P.3d at 879 (remanding for resentencing based on trial court's consideration of improper aggravating factors even though defendant had received mitigated sentence). In any event, we find no sentencing error, fundamental or otherwise.

the Department of Corrections." On appeal, however, Weeks suggests the court should have "reduce[d]" his sentence under § 13-603(L). But, that section does not authorize a court to reduce an excessive sentence. Rather, it merely authorizes a court to "enter a special order allowing the person sentenced to petition the board of executive clemency for a commutation of sentence within ninety days after the person is committed to the custody of the state department of corrections." § 13-603(L). Indeed, "Arizona courts have a duty to impose a sentence authorized by statute and within the limits set by the legislature." *State v. Monaco*, 207 Ariz. 75, ¶ 9, 83 P.3d 553, 556 (App. 2004). "Only if a sentence is so severe that it is grossly disproportionate to the offense and violates the Eighth Amendment [of the United States Constitution] may the courts examine the facts of the case and the circumstances of the offender and reduce the sentence." *Id.* Weeks did not urge below and does not argue on appeal that his sentence was so severe that it violated the Eighth Amendment.

¶52 In order to allow a person to petition the clemency board for commutation of sentence pursuant to § 13-603(L), a trial court must "set forth in writing its specific reasons for concluding that the sentence is clearly excessive." *Id.* Here the trial court did not find the sentences excessive. Rather, it stated, "[t]his case is an horrific example of domestic violence which requires a severe penalty," and then expressly ruled, "I do not find the sentence is clearly excessive." We cannot say the trial court abused its discretion in so finding. *See State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003) ("We will

find an abuse of sentencing discretion only if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing.").

¶53 We likewise decline Weeks's request to exercise our discretionary authority to reduce clearly excessive sentences pursuant to § 13-4037(B). *See State v. Long*, 207 Ariz. 140, n.6, 83 P.3d 618, 626 n.6 (App. 2004). "This statutory power must be exercised with great caution." *State v. Fillmore*, 187 Ariz. 174, 185, 927 P.2d 1303, 1314 (App. 1996). In view of the serious, violent crimes of which Weeks was convicted and the finding by the jury and trial court of severe emotional harm to the victim, we cannot say his sentences totaling 44.5 years were clearly excessive and have no valid basis for disturbing them.

Disposition

¶54 Weeks's convictions and sentences are affirmed.

_____
JOHN PELANDER, Chief Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Presiding Judge

_____
PHILIP G. ESPINOSA, Judge